IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., K.S., A.V., G.Z., D.S., C.A., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:18-cv-02718-RDM

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF OF SENATOR PATRICK J. LEAHY, SENATOR RON WYDEN, SENATOR SHELDON WHITEHOUSE, SENATOR RICHARD BLUMENTHAL, SENATOR JEFF MERKLEY, SENATOR CORY BOOKER, AND SENATOR KAMALA D. HARRIS IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Local Rule 7(o), Senator Patrick J. Leahy, Senator Ron Wyden, Senator Sheldon Whitehouse, Senator Richard Blumenthal, Senator Jeff Merkley, Senator Cory Booker, and Senator Kamala D. Harris (collectively, "Proposed *Amici*") hereby move this Court for leave to file the annexed brief as *amici curiae* in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (ECF No. 6) (the "TRO Motion"). In support of this motion, Proposed *Amici* state as follows:

1. Proposed *Amici* are seven members of the United States Senate:
    a. **Senator Patrick J. Leahy** has represented the State of Vermont since 1975, and is the longest-serving current member of the United States Senate.
    b. **Senator Ron Wyden** has represented the State of Oregon since 1996, and represented Oregon's Third Congressional District in the U.S. House of Representatives from 1981 to 1996.

c. **Senator Sheldon Whitehouse** has represented the State of Rhode Island since 2007. Senator Whitehouse previously served as the Attorney General of Rhode Island from 1999 to 2003.

d. **Senator Richard Blumenthal** has represented the State of Connecticut since 2011. Prior to his election to the U.S. Senate, Senator Blumenthal served five terms as the Attorney General of Connecticut.

e. **Senator Jeff Merkley** has represented the State of Oregon since 2009. In addition, Senator Merkley served in the Oregon House of Representatives from 1999 to 2009, including serving as the Speaker of the Oregon House of Representatives from 2007 to 2009.

f. **Senator Cory Booker** has represented the State of New Jersey since 2013. Senator Booker was the thirty-sixth Mayor of Newark, New Jersey from 2006 to 2013.

g. **Senator Kamala D. Harris** has represented the State of California since 2017. Senator Harris previously served as the Attorney General of California from 2011 to 2017.

2. As Members of Congress, *amici* have a strong interest in ensuring that the Department of Justice and the Department of Homeland Security comply with their duties to manage the asylum system consistent with the detailed and often-revisited immigration laws. As members of the Legislative Branch, *amici* are uniquely well-suited to address Congress's unambiguous intent to ensure that a refugee's irregular manner of entry is not to be given dispositive weight in the asylum process. Congress's resolve in this regard is reflected in the text of the statute, its legislative history, and Congress's clearly-expressed intent to comply with the United States' treaty obligations.

3. It is within "this Court's inherent authority to permit amici participation." *United States v. US Airways Grp.*, 38 F. Supp. 3d 69, 74 (D.D.C. 2014) (Kollar-Kotelly, J.). Leave to file an *amicus* brief is normally granted when the brief will aid the Court's resolution of the motion or issue by, for example, "presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *In re Search for Information*, 13 F. Supp. 3d 157, 167 (D.D.C. 2014) (citation omitted). *Amicus* briefs are particularly helpful to the court when "the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Id.* (citations omitted).

4. Proposed *Amici*'s request for leave to file the amicus brief is timely. *See* L.R. 7(o)(2) ("The amicus brief shall be filed within such time as the Court may allow."); L.R. 7(o)(2) (motion for leave "shall be filed in a timely manner such that it does not unduly delay the Court's ability to rule on any pending matter"). Plaintiffs filed the TRO Motion on November 21, the government opposed on December 7, and Plaintiffs replied on December 12, 2018. The Court has set a hearing for December 17, 2018. *See* Minute Order (Nov. 30, 2018). Mindful of the short schedule on which the pending motion will be heard, Proposed *Amici* present this motion for leave and the annexed proposed *amicus* brief on December 13, 2018.

5. Counsel for Proposed *Amici* contacted counsel for the parties to determine whether they consent or oppose this motion for leave. Counsel for Plaintiffs has consented to the filing of the *amicus* brief. Counsel for Defendants takes no position on this motion for leave.

WHEREFORE, Proposed *Amici* respectfully request leave to file the annexed brief as *amici curiae* in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

Dated: December 13, 2018

MORGAN, LEWIS & BOCKIUS LLP

By: /s/ *Susan Baker Manning*

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[1] Admission to the D.C. Bar certified and pending; supervised by D.C. Bar members.

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December, 2018, the foregoing Motion for Leave to File Brief as Amici Curiae and the appended Proposed Order and Brief of Amici Curiae will be filed with the Court and submitted to all counsel of record by operation of the Court's electronic filing system.

Dated: December 13, 2018

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BRIEF OF *AMICI CURIAE* SENATOR PATRICK J. LEAHY, SENATOR RON WYDEN, SENATOR SHELDON WHITEHOUSE, SENATOR RICHARD BLUMENTHAL, SENATOR JEFF MERKLEY, SENATOR CORY BOOKER, AND SENATOR KAMALA D. HARRIS IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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I. INTEREST OF *AMICI CURIAE*

Amici are seven members of the United States Senate:

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As Members of Congress, *amici* have a strong interest in ensuring that the Department of Justice and the Department of Homeland Security comply with their duties to manage the asylum

system consistent with the detailed and often-revisited immigration laws. As members of the Legislative Branch, *amici* are uniquely well-suited to address Congress's unambiguous intent to ensure that a refugee's irregular manner of entry is not to be given dispositive weight in the asylum process. Congress's resolve in this regard is reflected in the text of the statute, its legislative history, and Congress's clearly-expressed intent to comply with the United States' treaty obligations.[1]

II. INTRODUCTION

Our landmark asylum laws have protected religious, ethnic, and other refugees for generations, and—in this Nation of immigrants—those laws follow an even older tradition of welcoming individuals who flee tyranny and persecution. The President's efforts to prevent migrants who cross our southwest border from making a claim for asylum are illegal. United States law is crystal clear that men, women, and children who arrive at any point on our borders may seek asylum. A meritorious claim of asylum cannot be denied merely because an individual crossed into this country at a point other than a designated port of entry.

In 1980, *amicus* Senator Leahy's sixth year in the United States Senate, Congress amended the Immigration and Nationality Act ("INA") to replace the *ad hoc* refugee and asylum system that had been built up over the proceeding century and established "for the first time a comprehensive United States refugee resettlement and assistance policy." S. Rep. No. 96-256, at 1 (1979). In explaining the purpose of the law, Congress declared:

> [I]t is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands, including, where appropriate, humanitarian assistance for their care

[1]In compliance with LCvR 7(o)(5), and in compliance with Federal Rules of Appellate Procedure 29(a)(4)(E), counsel for *amici curiae* certifies that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no persons other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

> and maintenance in asylum areas, efforts to promote opportunities for resettlement or voluntary repatriation, aid for necessary transportation and processing, admission to this country of refugees of special humanitarian concern to the United States, and transitional assistance to refugees in the United States.

Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980). The Refugee Act of 1980 thus "reflects one of the oldest themes in America's history—welcoming homeless refugees to our shores" and "gives statutory meaning to our national commitment to human rights and humanitarian concerns." S. Rep. 96-256, at 1 (1979).

Among other things, the Refugee Act codified the earliest version of 8 U.S.C. § 1158, the key statutory provision at issue in this case. Pub. L. No. 96-212, § 201(b), 94. Stat. 105. As *amici* will explain, the Refugee Act brought U.S. law into alignment with the United Nations Refugee Convention's provision that refugees present in a country without authorization would not be penalized "on account of their illegal entry or presence." United Nations Convention Relating to the Status of Refugees art. 31, ¶1, July 28, 1951, 189 U.N.T.S. 150, 176 ("1951 Refugee Convention").

Building upon that foundation, in 1996, Congress amended § 1158 to provide:

> Any alien who is physically present in the United States or who arrives in the United States *(whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b) of this title.

Pub. L. No. 104-208, § 604(a), Div. C., 110 Stat. 3009, 3690 (codified at 8 U.S.C. § 1158(a)(1)) (emphasis added). The statute's plain and unambiguous language means what it says. Section 1158(a)(1) reflects Congress's specific, bipartisan intent to ensure that an applicant's manner of arrival is not a bar to a meritorious asylum claim. Since Congress first adopted § 1158 in 1980, it has amended the INA more than forty times. Throughout those thirty-eight years, Congress has

never wavered from the bipartisan consensus that the manner by which an individual arrives in the United States should not, and does not, prevent that individual's asylum claim from being considered on the merits.

The Rule promulgated by the Department of Justice and Department of Homeland Security, and the associated Presidential Proclamation, are inconsistent with § 1158. *See* Aliens Subject to Bar on Entry Under Certain Presidential Proclamations; Procedure for Protection Claims, 83 Fed. Reg. 55,934 (Nov. 9, 2018) ("Rule"); Proclamation No. 9822, Addressing Mass Migration Through the Southern Border of the United States, 83 Fed. Reg. 57,661 (Nov. 9, 2018) ("Proclamation"). Although Congress authorized the Attorney General to "by regulation establish additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum," the Attorney General's rulemaking authority does not permit him to hold up the failure to enter through a designated port of entry as a categorical bar to asylum. 8 U.S.C. § 1158(b)(2)(C) (emphasis added). Congress, by statute, expressly provided that such conduct would *not* make an individual ineligible for asylum.

Not everyone who seeks asylum will be successful, but every person who seeks asylum is entitled to a fair hearing, regardless of where they enter our country. This is the unambiguous dictate of U.S. law. The President has made no secret of his disagreement with the policy choices codified in § 1158(a)(1). But in our democratic system, laws may not be overturned by Executive *fiat*.

III. DECADES OF LEGISLATIVE HISTORY REFLECT STRONG BIPARTISAN SUPPORT FOR ASYLUM.

Over the course of many decades, Congress has worked on a bipartisan basis to safeguard asylum in the United States for refugees persecuted abroad. Congress has long "review[ed] immigration policy in light of America's best interest, yet with full regard for our immigrant

heritage and our humanitarian traditions." S. Rep. No. 97-485, at 124 (1982) (Ranking Member, Senator Edward M. Kennedy). Those humanitarian traditions underpin our decision that any alien may apply for asylum regardless of where that alien entered this country.

A. The Humanitarian Crises of World War II Catalyzed Modern Asylum Law, Both Internationally and in The United States.

Our Founding Fathers recognized that our country should serve as a haven of liberty, and that the young Nation already had an established tradition of offering refuge to those fleeing persecution. *See, e.g.*, James Madison, *Memorial and Remonstrance Against Religious Assessments* (1795) (opposing state support for Christian instruction as "a departure from that generous policy, which, offering an Asylum to the persecuted and oppressed of every Nation and Religion, promised a lustre to our country, and an accession to the number of its citizens"). History teaches not only the immeasurable contributions immigrants have made to our country, but also the horror and intolerable suffering that may follow when refugees are unable to gain asylum.

Following the Holocaust and other humanitarian crises during and in the immediate aftermath of World War II, the international community resolved that future refugees would not be abandoned to their fate. *See* Dr. Paul Weis, U.N. High Commissioner for Refugees, The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis 5 (1990), https://www.refworld.org/docid/53e1dd114.html (explaining that the UN Convention Relating to the Status of Refugees originally was adopted to address the WWII refugee issue in Europe). The 1951 Refugee Convention codified in international law the principal that refugees present in a country of refuge without authorization would not be penalized "on account of their illegal entry or presence." 1951 Refugee Convention, art. 31, ¶1.

The United States played an active, leading role in drafting the 1951 Refugee Convention. Domestically, in the post-war years, the United States also addressed the status of refugees in a

series of ad hoc laws and programs.[2] *See* S. Exec. Rep. No. 90-14 (1968). And President Truman called for "suitable legislation at once so that this nation may do its share in caring for homeless and suffering refugees of all faiths." Harry S. Truman, President of the United States, State of the Union Address (Jan. 7, 1948).

The United States passed the Immigration and Nationality Act ("INA") in 1952. Pub. L. No. 82-414, 66 Stat. 163 (1952). This first version of the INA did not did not fully address our immigration and asylum issues, but Congress continued to work in a bipartisan manner to develop more comprehensive legislation in "an atmosphere of calm, compassionate, and careful deliberations." *Joint Hearings Before the Subcomm. on Immigration and Policy of the S. Comm. on the Judiciary and Subcomm. on Immigration, Refugees and International Law of the S. Comm. on the Judiciary*, 97th Cong. 4 (1981) (statement of Hon. Alan K. Simpson, Chairman, Subcomm. on Immigration and Refugee Policy).

In 1968, the United States ratified the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 ("1967 Protocol"), which adopted all of the substantive provisions of the 1951 Convention. The Senate voted *unanimously* to ratify the 1967 Protocol. *See* U.N. Protocol Relating to the Status of Refugees, *ratified* Oct. 4, 1968, 606 U.N.T.S. 267. The United States officially acceded to the 1967 Protocol on November 1, 1968.

[2] *See, e.g.,* Displaced Persons Act, Pub. L. 80-774, 62 Stat. 1009 (1948); Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952); Cuban Adjustment Act, Pub. L. 89-732 (1965); Immigration and Nationality Act of 1965, H.R. 2580, Pub. L. 89–236, 79 Stat. 911 (1968); Arthur C. Helton, *Political Asylum under the 1980 Refugee Act: An Unfulfilled Promise*, 17 U. MICH. J.L. REF. 243, 243-44 (1984) ("[T]he history of asylum and refugee law in this country prior to 1969 is essentially a saga of reaction to crises as they arose.") (citation omitted); Deborah E. Anker et al., *Forty Year Crisis: A Legislative History of the Refugee Act of* 1980, 19 San DIEGO L. REV. 9, 10 (1981) ("When the permanent refugee admission quota was finally written into law in 1965, its geographic, ideological and numerical qualifications were already completely inadequate to deal with the scope of the refugee problem.").

See U.N. Protocol Relating to the Status of Refugees, *adopted* Nov. 1, 1968, 606 U.N.T.S. 267. The fundamental humanitarian principals animating the Refugee Convention remain settled international law and are reflected in decades of domestic asylum law. *See* U.N. Protocol Relating to the Status of Refugees, List of Participants.

B. In The Refugee Act of 1980, Congress Ensured that Eligibility for Asylum Would Not Turn on Where or How an Applicant Arrived in the U.S.

Congress substantially amended the INA in the Refugee Act of 1980. Pub. L. No. 96–212, 94 Stat. 102 (1980). The Refugee Act made a number of foundational changes to U.S. asylum law to implement the United States' treaty obligations under the 1967 Protocol. The Refugee Act "respond[ed] to the urgent needs of persons subject to persecution in their homelands" by "provid[ing] a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States." Pub. L. No. 96–212 § 101(a), (b), 94 Stat. 102 (1980). The Refugee Act also codified our Nation's commitment, consistent with Article 31(1) of the 1951 Refugee Convention, as adopted by the 1967 Protocol, that refugees would not be penalized "on account of their illegal entry or presence" in the United States. 1967 Protocol art. 1, ¶1. *See also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 436-37 (1987) (the Act is intended "to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees").

Key here, Congress added section INA § 208, which provided:

> The Attorney General shall establish a procedure for *an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status*, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of [8 U.S.C. § 1101(a)(42)(A)].

Pub. L. No. 96-212, § 201(b), 94 Stat. 105 (codified at 8 U.S.C. § 1158(a) (1980)) (emphasis added). The Conference Report explained that this text was "based directly upon the language of

the [1967 Protocol] and it [was] intended that the provision be construed *consistent with the Protocol*" – *i.e.*, consistent with the commitment that refugees would not be penalized "on account of their illegal entry or presence" here. H.R. Conf. Rep. No. 96-781, at 161 (1980) (emphasis added).

The Department of Justice's final rule implementing section 208 recognized these and many other concrete steps Congress took under the Refugee Act to improve U.S. refugee policy, including by creating "a statutory basis for asylum"; making "withholding of deportation . . . mandatory rather than discretionary";[3] defining "refugee based on the definition . . . [in the] 1967 Protocol to the UN Convention Relating to the Status of Refugees"; establishing "a regular procedure for the admission for refugees" which "largely eliminate[ed] the need to use the Attorney General's parole authority";[4] and "requir[ing] the Attorney General to establish a procedure through which aliens already in the United States could apply for asylum on the basis of refugee status." Asylum and Withholding of Deportation Procedures, 55 Fed. Reg. 30674, 30675 (July 27, 1990).

Consistent with the 1967 Protocol, Congress included certain limits on eligibility for asylum in the Refugee Act, designed to prevent aliens posing an actual danger to the United States from obtaining asylum. *See* Pub. L. No. 96–212, § 203(e), 94 Stat. 107 (1980) (barring from eligibility for asylum aliens who had "participated in the persecution of any person"; "been

[3] *See* Pub. L. No. 96–212, § 203(e), 94 Stat. 107 ("The Attorney General shall not deport or return any alien . . . if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion").

[4] *See* Pub. L. No. 96–212, § 203(f)(3)(B), 94 Stat. 107 ("The Attorney General may not parole into the United States an alien who is a refugee unless the Attorney General determines that compelling reasons in the public interest with respect to that particular alien."); *id.* at § 201(b) (requiring that "waiver by the Attorney General shall be in writing and shall be granted only on an individual basis following an investigation").

convicted . . . of a particularly serious crime"; "committed a serious nonpolitical crime . . . prior to [] arrival"; or where there were "reasonable grounds for regarding the alien as a danger to the security of the United States") (codified at 8 U.S.C. § 1158(b)(2)(A) (2012)). These limitations barred the grant of asylum to certain criminals. But Congress has never limited a refugee's eligibility to apply for and obtain asylum based on where that individual entered our country. To the contrary—the plain text of § 1158 provides that aliens may seek asylum regardless of their immigration status, *i.e.*, whether or not they lawfully entered the country. This is our obligation under the 1967 Protocol.

The Refugee Act ushered in a new era of asylum law in the United States. *Amicus* Senator Leahy voted for the Refugee Act of 1980, along with 50 fellow Democrats, 33 Republicans, and 1 Independent.[5] As Congress subsequently has amended the INA more than 40 times since 1980,[6]

[5] Fifteen Senators abstained. *See Senate Vote #262 in 1979 (96th Congress)*, GOVTRACK (last visited Dec. 13, 2018), https://www.govtrack.us/congress/votes/96-1979/s262.

[6] *See* Health Programs Extension Act of 1980, Pub. L. No. 96-538, 94 Stat. 3192 (1980); Immigration and Nationality Act Amendments of 1981, Pub. L. No. 97-116, 95 Stat. 1611 (1981); Pub. L. No. 98-454, 98 Stat. 1732 (1984); Department of the Interior and Related Agencies Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 2028 (1984); Revised Organic Act of the Virgin Islands, Amendments, Pub. L. No. 99-396, 100 Stat. 842 (1986); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-47 (1986); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3543 (1986); Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, 100 Stat. 3657 (1986); Foreign Relations Authorization Act, Fiscal Years 1988 and 1989, Pub. L. No. 100-204, 101 Stat. 1399 (1987); Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, 102 Stat. 2614 (1988); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4473 (1988); Pub. L. No. 101-238, 103 Stat. 2100 (1989); Foreign Relations Authorization Act, Fiscal Years 1990 and 1991, Pub. L. No. 101-246, 104 Stat. 30 (1990); National Institutes of Health Revitalization Act of 1993, Pub. L. No. 103-43, 107 Stat. 210 (1993); Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1995, Department of Justice and Related Agencies Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1765 (1994); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2024 (1994); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4306 (1994); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1268 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009-562 (1996); Immigration and Nationality Act, Amendments, Pub. L. No. 105-73, 111 Stat. 1459 (1997); Omnibus Consolidated

Congress has remained stalwart that aliens present in the United States may seek asylum through a fair and consistent process. As Senator Kennedy, the Refugee Act's original sponsor, observed: "Immigration is both America's past and future. . . . It strengthens the economic and cultural life of our country. And it assures that America will always be a home for the homeless." S. Rep. No. 97-485, at 124 (1982) (Ranking Member, Senator Edward M. Kennedy).

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and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-642(1998); International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2814 (1998); Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No 106-95, 113 Stat. 1312 (1999); Intelligence Authorization Act for Fiscal Year 2000, Pub. L. No. 106-120, 113 Stat. 1632 (1999); American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, 114 Stat. 1254 (2000); Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1478 (2000); Child Citizenship Act of 2000, Pub. L. 106-395, 114 Stat. 1633 (2000); Visa Waiver Permanent Program Act, Pub. L. No. 106-396, 114 Stat. 1638 (2000); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2002, Pub. L. No. 107-56, 115 Stat. 345 (2001); Family Sponsor Immigration Act of 2002, Pub. L. No. 107-150, 116 Stat. 74 (2002); United States Chile Free Trade Agreement Implementation Act, Pub. L. No. 108-77, 117 Stat. 940 (2003); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2879, 2886 (2003); Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, 118 Stat. 3353-55 (2004); Irish Peace Process Cultural and Training Program Act of 1998, Amendments and Extension, Pub. L. No. 108-449, 118 Stat. 3470 (2004); Intelligence Reform and Terrorism Prevention act of 2004, Pub. L. No. 108-458, 118 Stat. 3740, 3741 (2004); Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, Pub. L. No 109-13, 119 Stat. 306-09, 322 (2005); Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 3054 (2006); Violence Against Women and Department of Justice Reauthorization Act of 2005, Technical Amendments, Pub. L. No. 109-271, 120 Stat. 762 (2006); Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, 121 Stat. 2364, 2365 (2007); Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 859-60, 862 (2008); Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, Pub. L. No. 110-293, 122 Stat. 2963 (2008); Child Soldiers Accountability Act of 2008, Pub. L. No. 110-340, 122 Stat. 3736 (2008); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5071, 5074 (2008); Human Rights Enforcement Act of 2009, Pub. L. No. 111-122, 123 Stat. 3481 (2009); International Adoption Simplification Act, Pub. L. No. 111-287, 124 Stat. 3058 (2010); Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 111 (2013).

C. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Congress Again Specified Eligibility for Asylum Would Not Depend on Whether an Applicant Arrived at a Designated Port of Entry.

In addition to numerous interim updates, Congress undertook another comprehensive reform of asylum law in 1996. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") was part of the Omnibus Consolidated Appropriations Act. Pub. L. No. 104-208, 110 Stat. 3009 (1996). Relevant here, Congress clarified a number of provisions relating to asylum,[7] including § 1158(a), to ensure that the asylum process was available to all aliens with a credible fear of persecution—regardless of the manner of entry. *See* H. R. Conf. Rep. No. 104-828, at 209 (1996) (explaining that aliens could be subject to the new expedited removal process under § 1225(b) would have an "opportunity . . . *[to] claim[] asylum [and] to have the merits of his or her claim promptly assessed*[,]" and if credible, to transfer their case to the normal (non-expedited removal) proceedings); *see also* H. Rep. No. 104-469, at 107-08 (1996).

Congress revised the text of § 1158(a)(1) to provide its current language:

> Any alien who is physically present in the United States or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

Pub. L. No. 104-208, § 604(a), Div. C., 110 Stat. 3690 (codified at 8 U.S.C. § 1158(a)(1)).

[7] *See, e.g.*, 8 U.S.C. § 1225(a)(1) ("An alien present in the United States who has not been admitted or who arrives in the United States (*whether or not at a designated port of arrival* and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this chapter an applicant for admission."); *id.* at §1225(a)(2) (An arriving alien *who is a stowaway* is not eligible to apply for admission or to be admitted and shall be ordered removed upon inspection . . . [but] if the alien indicates an *intention to apply for asylum under section 208* or a fear of persecution, the officer shall refer the alien for an interview under subsection (b)(1)(B). A stowaway may apply for asylum only if the stowaway is found to have a credible fear of persecution under subsection (b)(1)(B).").

Amicus Senator Leahy voted for the IIRIRA as a standalone bill in the Senate and then again as part of the appropriations bill in 1996. The standalone bill was passed 97 to 3, and the final law passed with robust bipartisan support in the Senate, with 22 Democrats and 50 Republicans voting in favor. The law also passed with bipartisan support in the House, with 88 Democrats and 190 Republicans voting in favor.

Section 1158(a)(1) could not be any clearer: any alien present in the United States may seek asylum, regardless of where or how that alien entered the country. The President is not empowered to overturn this Law. The Proclamation and corresponding Rule run directly counter to § 1158(a)(1) and are unlawful.

D. The Executive May Not Adopt a Rule that Plainly Contradicts the INA and Exceeds the Boundaries of Delegated Authority.

On the morning of November 9, 2018, the Department of Justice and the Department of Homeland Security jointly issued an interim final rule that purports to make "ineligible for asylum" any alien who is "subject to a presidential proclamation or other presidential order suspending or limiting the entry of aliens along the southern border with Mexico that is issued pursuant to subsection 212(f) or 215(a)(1) of the [INA] on or after November 9, 2018 and the alien enters the United States after the effective date of the proclamation or order contrary to the terms of the proclamation or order." 83 Fed. Reg. 55934 (codified at 8 C.F.R. § 208.13(c)(3)).[8] Later that day, the President issued the Proclamation suspending for 90 days "[t]he entry of any alien into the United States across the international boundary between the United States and Mexico" except "at a port of entry" where the non-resident alien "properly presents for inspection." Proclamation, 83 Fed. Reg. 57,661.[9] Under the Rule and Proclamation, "asylum [may] be granted only to those who

[8] The Rule was promulgated without prior public notice and comment. 83 Fed. Reg. 55934.
[9] The Rule is not limited to the particular Presidential proclamation issued on November 9, 2018. Rather, the Rule would bar asylum claims by an alien who enters the United States in violation of

cross at a designated port of entry" and the Rule and Proclamation "deny asylum to those who enter at any other location along the southern border of the United States." *East Bay Sanctuary Covenant v. Trump*, — F. Supp. 3d —, No. 18-cv-06810-JST, 2018 WL 6053140, at *1 (N.D. Cal. Nov. 19, 2018).

The Attorney General's rulemaking authority is broad, but not limitless. Congress expressly constrained the scope of that rulemaking authority by statue, specifying that any regulation must be consistent with the other requirements of the INA. In § 1158(b)(2)(C), Congress authorized the Attorney General to "by regulation establish additional limitations and conditions, *consistent with this section*, under which an alien shall be ineligible for asylum under" § 1158(a)(1) (emphasis added). Similarly, under § 1158(d)(5)(B), "The Attorney General may provide by regulation for any other conditions or limitations on the consideration of an application for asylum *not inconsistent with this chapter*." 8 U.S.C. § 1158(d)(5)(B) (emphasis added).

Taken together, the Rule and Proclamation do not implement the law—they re-write it. Section 1158(a)(1) provides that any alien "who is physically present in the United States or arrives in the United States (*whether or not at a designated port of arrival*[)] . . . may apply for asylum." 8 U.S.C. § 1158(a)(1) (emphasis added). The Rule and Proclamation directly contradict this express prohibition on barring asylum claims by an alien who arrives other than at a port of entry.

The government defendants make two primary arguments as to why the Rule and Proclamation are ostensibly "consistent with" § 1158(a)(1)'s provision stating that any alien may apply for asylum regardless of whether he or she arrived through a designated port of entry. First, the Executive contends that 1158(a)(1) merely provides that an alien may *apply* for asylum

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any future Presidential proclamation or order concerning entry of aliens across the U.S.-Mexico border. 83 Fed. Reg. 55934.

regardless of the place of entry or arrival, but says nothing about whether that application may be *summarily denied* because of the place of entry or arrival. Def. Br. at 17-22. The Executive thus suggests that § 1158(a)(1) creates a paper exercise, and does not provide any substantive protections for aliens—notwithstanding Congress's clear intent that the manner of entry not be a categorical bar to a meritorious asylum claim, as discussed above.

The U.S. District Court for the Northern District of California has already properly rejected this argument as irreconcilable with the statutory text and Congress's clear intent:

> Defendants contend that even if Congress unambiguously stated that manner of entry has no effect on an alien's ability to apply for asylum, it can be the sole factor by which the alien is rendered ineligible. The argument strains credulity. To say that one may apply for something that one has no right to receive is to render the right to apply a dead letter. There simply is no reasonable way to harmonize the two.
>
> Clearly, the Attorney General may deny eligibility to aliens authorized to apply under § 1158(a)(1), whether through categorical limitations adopted pursuant to § 1158(b)(2)(C) or by the exercise of discretion in individual cases. But Congress's judgment that manner of entry should have no impact on ability to apply necessarily implies some judgment that manner of entry should not be the basis for a categorical bar that would render § 1158(a)(1)'s terms largely meaningless. Basic separation of powers principles dictate that an agency may not promulgate a rule or regulation that renders Congress's words a nullity. *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("As we have held on prior occasions, [an agency's] 'interpretation' of the statute cannot supersede the language chosen by Congress.").
>
> Next, Defendants argue that because the agency is permitted to give manner of entry some weight, *see Matter of Pula*, 19 I & N. Dec. at 474, then Defendants could give it conclusive weight. As with Defendants' prior argument, this one fails because it runs headlong into the contrary language of the statute. And Defendants' reliance on *Lopez v. Davis*, 531 U.S. 230 (2001), is misplaced. Though *Lopez* approved the Bureau of Prisons' categorical rule denying early release to certain prisoners, *id*. at 243-44, the rule in "*Lopez* applies only when Congress has not spoken to the precise issue and the statute contains a gap." *Toor v. Lynch*, 789 F.3d 1055, 1064 (9th Cir. 2015) (citation omitted). Congress has done so here.

East Bay, 2018 WL 6053140, at *12-13 (internal citation and footnote omitted); *see also* *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980) ("As we have held on prior occasions, [an

agency's] 'interpretation' of the statute cannot supersede the language chosen by Congress.").

Second, the Executive argues that ineligibility for asylum under the Rule "is not predicated upon the manner of an alien's entry per se, but upon whether an alien has contravened a Presidential proclamation concerning the southern border." Def. Br. at 22. This is a distinction without a difference because both the Rule and Proclamation are expressly aimed at the problem of illegal entry across the U.S.-Mexico border. *See, e.g.*, 83 Fed. Reg. 55934, 55935 (discussing the "Purpose of This Interim Final Rule" and describing problems associated with "aliens who enter unlawfully between ports of entry along the southern border, as opposed to at a port of entry"); 83 Fed. Reg. 57661 (discussing the unlawful entry of aliens into the United States between ports of entry on the southern border). The government defendants cite no authority for this belt-and-suspenders argument, and do not explain why a regulation incorporating a Presidential proclamation prohibiting entry except under lawful conditions warrants a different analysis than that which would be applied to any other regulation. Neither the President nor the Attorney General are empowered to rewrite the law.

The Executive made a similar argument in *East Bay*, which the court properly rejected:

> Defendants suggest that, even if the manner of entry deserves little weight as a general matter, violation of a Presidential proclamation is of particularly grave consequence and is therefore distinct from an "ordinary" entry violation. The asserted distinction is not supported by evidence or authority. And if what Defendants intend to say is that the President by proclamation can override Congress's clearly expressed legislative intent, simply because a statute conflicts with the President's policy goals, the Court rejects that argument also. No court has ever held that § 1182(f) "allow[s] the President to expressly override particular provisions of the INA." *Trump v. Hawaii*, 138 S. Ct. 2392, 2411 (2018).

East Bay, 2018 WL 6053140, at *13.

In the INA, Congress vested the Attorney General with discretion, subject to specific limitations, to grant asylum, and to establish regulatory "limitations and conditions, *consistent with*

this section, under which an alien shall be ineligible for asylum." 8 U.S.C. §§ 1158(b)(1)(a) & 1158(b)(2)(C) (emphasis added). Neither the Attorney General's discretion to grant asylum nor his rulemaking authority permit him to make the failure to enter through a designated port of entry a categorical bar to asylum where Congress, by statute, expressly provided that such conduct would *not* make an individual ineligible for asylum.

The Attorney General cannot escape the statutory limitations on his authority by citing to an extant or future Presidential proclamation, where, as here, that proclamation is or would be in violation of duly enacted Law. The President "cannot take away the [Attorney General's] statutory authority or exercise it himself." *Main St. Legal Servs., Inc. v. Nat'l Sec. Council*, 811 F.3d 542, 558 (2d Cir. 2016). Likewise, the President cannot expand the Attorney General's statutory authority in contravention of an express statute. As discussed below, Executive Branch officials, including the President and Attorney General, are cabined by their limited constitutional authority: they may not legislate and are required to execute the Law as written.

IV. SEPARATION OF POWERS

The separation of powers between three independent, coequal Branches of Government is fundamental to our constitutional democracy. *See* U.S. CONST. art. I, II, III; *see generally* The Federalist No. 51 (James Madison) (discussing the importance of checks and balances in our democracy). "[C]onvenience and political considerations of the moment do not justify a basic departure from the principles of our system of government." *New York Times Co. v. United States*, 403 U.S. 713, 742–43 (1971) (Marshall, J., concurring).

As Article I, Section 1 of the Constitution provides, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. CONST. art. I, § 1. Congress alone is vested with power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the [Powers enumerated in

Article I, Section 8] and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8.

As current and former Members of Congress, we committed to uphold the Constitution by "well and faithfully" enacting "all Laws" of the Federal Government. 5 U.S.C. § 3331 (congressional oath of office). This is a monumental responsibility in furtherance of justice. We do not make Laws lightly. There must be sufficient agreement that a Law is in the best interests of our great country, both in its purpose and in its specific language. As Members of the Legislative Branch, we engage in significant inquiry, analysis, and debate in order to build consensus among the numerous Senators and Representatives who must agree to pass a Law. This is the hard work of Democracy. And when we pass a Law, we mean it. *See In re Pangang Grp. Co. LTD.*, 901 F.3d 1046, 1056 (9th Cir. 2018) (quoting *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253 (1992)) ("The first and most important canon of statutory construction is the presumption 'that a legislature says in a statute what it means and means in a statute what it says there.'").

The Executive Branch may not supersede or overturn a duly enacted Law. On the contrary, the Constitution expressly provides that the President "shall take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Put simply, the President is bound by the Laws that Congress enacts. In executing the Law, the Executive Branch may, with requisite notice and comment, issue administrative rules and regulations as appropriate—but only because, in § 1158 the Congress delegated that authority to the Attorney General. Executive Branch rulemaking cannot be used to defeat congressional intent and express statutory language. The Executive Branch may not set aside the governing Law, by Rule, Proclamation, or otherwise. In the Founding Fathers' wisdom, the President has no such power.

For decades, in accordance with international law and with consistent bipartisan support,

Congress has made it the clear and express Law that an alien who is physically present in the United States may apply for asylum regardless of where that alien entered our country. There is no other possible meaning for the plain language "who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters)." Section 1158(a) is the duly enacted and governing Law, which the Executive Branch must faithfully execute. The Executive Branch of the moment may not like this Law, but only the Congress, through legislation, can change it. And Congress has not done so.

V. CONCLUSION

For all of these reasons, *amici curiae* respectfully suggest that Plaintiffs are likely to succeed on the merits of their claims, and Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction should be granted.

Dated: December 13, 2018

Respectfully Submitted,

MORGAN, LEWIS & BOCKIUS LLP

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[10] Admission to the D.C. Bar certified and pending; supervised by D.C. Bar members.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

O.A., K.S., A.V., G.Z., D.S., C.A., Plaintiffs, v. DONALD J. TRUMP, et al., Defendants.	Civil Action No. 1:18-cv-02718-RDM

[PROPOSED] ORDER GRANTING MOTION OF SENATOR PATRICK J. LEAHY, SENATOR RON WYDEN, SENATOR SHELDON WHITEHOUSE, SENATOR RICHARD BLUMENTHAL, SENATOR JEFF MERKLEY, SENATOR CORY BOOKER, AND SENATOR KAMALA D. HARRIS TO FILE BRIEF AS AMICI CURIAE

Upon consideration of the Motion of Senator Patrick J. Leahy, Senator Ron Wyden, Senator Sheldon Whitehouse, Senator Richard Blumenthal, Senator Jeff Merkley, Senator Cory Booker, and Senator Kamala D. Harris for Leave to File Brief as *Amici Curiae* in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction,

IT IS HEREBY ORDERED that the Motion is GRANTED; and it is further ORDERED that the Proposed Brief submitted with the Motion be accepted as the Brief of *Amici Curiae* Senator Patrick J. Leahy, Senator Ron Wyden, Senator Sheldon Whitehouse, Senator Richard Blumenthal, Senator Jeff Merkley, Senator Cory Booker, and Senator Kamala D. Harris in support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

Dated: _____

_____
The Honorable Randolph D. Moss
United States District Judge